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**Revisiting the Rule of Law under the
European Convention of Human Rights:
*Gillan and Quinton v The United Kingdom***

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Abstract

This case note considers the rule of law implications of the European Court of Human Rights' decision in *Gillan and Quinton v UK* (App no 4158/05, 12 Jan 2010, nyr) involving the UK's stop and search powers under the Terrorism Act 2000.

Keywords

Human Rights, ECHR, Stop and Search, Terrorism Act 2000, Anti-terrorism, Police Powers, Human Rights Act 1998.

The UK's terrorist legislation has been produced at a frenetic pace over the past decade. Almost equally as frenetic as the pace of production have been challenges taken against anti-terror measures on a variety of grounds, none more so than for violating the European Convention of Human Rights incorporated in the Human Rights Act 1998, reflecting the ambivalent attitude to human rights of the previous Labour government. The cornerstone of the anti-terrorism regime, the Terrorism Act 2000 (TA) has proved particularly controversial, none more so than its capacious definitions of terrorist offences.¹ Among its many provisions, it provides sweeping police powers of stop and search contained in ss. 44 to 47 of the Act which entail three distinct stages. Firstly, under section 44 TA, the powers themselves are created by specific authorisation by an officer of no lower than the rank of assistant chief inspector for a fixed period of time not exceeding 28 days and are limited to a specific geographic area.² The effect of these *prima facie* limitations is somewhat weakened by the fact that the threshold for the invocation of the powers is set rather low, requiring that such powers be considered merely 'expedient'³ rather than 'necessary' for the prevention of acts of terrorism. Once the power has been specifically authorised, it is subject to confirmation by the Secretary of State who must be informed as soon as the power is authorised.⁴ If the Secretary of State does not confirm the creation of the exceptional powers then they automatically expire within 48 hours.⁵ Finally, the third stage relates to the execution of the stop and search powers at the 'coalface' as it were, that is their exercise by individual officers. S. 44 permits a constable in uniform to stop and search any vehicle, driver or pedestrian whatsoever within a designated area and period for the purposes of searching for articles of a kind which could be connected with terrorism.⁶ Moreover, and most controversially, there is no requirement that the constable have a reasonable suspicion that the individual being searched actually is carrying any such prohibited article.⁷ A failure to stop and search when requested and/or the wilful obstruction of an officer undertaking a search incurs a potential fine and imprisonment.⁸ The conditions of the exercise of stop and search powers in England and Wales are supplemented by the provisions of Code A of the

1 For discussion, see H Fenwick *Civil Liberties and Human Rights* (Routledge, 2007), Chapter 14.

2 S. 44(4)(a) TA.

3 S. 44(3) TA.

4 S. 46(3) TA.

5 S. 46(4) TA.

6 S. 44(1) and (2) TA.

7 S. 45(1)(b) TA.

8 S. 47(1) TA.

Police and Criminal Evidence Act 1984 which set out guidelines with respect to the execution of the stop and search powers.⁹

In August 2003, the Assistant Commissioner of the Metropolitan Police created stop and search powers with a s. 44 authorisation to apply to the entire Metropolitan Police District for the maximum period possible under the act (28 days) which was duly confirmed by the Secretary of State.¹⁰ It was pursuant to this authorisation that both Gillan and Quinton were stopped and searched on 9 Sept 2003. Mr Gillan, a PhD student, was riding a bicycle on his way to a protest against an arms fair being held in early September 2003 in the Excel Centre in London's Docklands. He was stopped by two police officers who, exercising their stop and search powers under the TA, searched his person and his rucksack before sending him on his way. He was detained for approximately 20 minutes. Ms Quinton was a freelance journalist who was in the vicinity of the protest in order to produce a documentary. She was stopped and searched by a police officer notwithstanding her explanation of her presence in the area and the production of her press pass. Again, the entire ordeal lasted no longer than 30 minutes. Seven years after these brief and relatively modest intrusions into the daily lives of these two individuals, and after a unanimous dismissal of their claim at three instances in the UK—before the Divisional Court,¹¹ the Court of Appeal¹² and the House of Lords¹³—the European Court of Human Rights (the Court or ECtHR) declared the powers in accordance with which they were detained and searched to constitute a violation of the European Convention on Human Rights in *Gillan and Quinton v The United Kingdom*.¹⁴

The Court, having extensively reviewed the legislation and judgments prior to the hearing as well as considering Lord Carlile's mounting exasperation with the exercise of the powers in practice in his annual reports,¹⁵ first considered the question of whether the powers could be considered to be a deprivation of liberty under Article 5 ECHR, something which was dismissed by the Lords on the grounds of the brevity of the search and that fact that it

9 Code A paragraphs 1.2, 1.3 and 2.19 to 2.23.

10 As the ECtHR noted in the *Gillan* case, the purportedly exceptional stop and search powers have become a permanent feature of the policing of the London area given that the authorisations have been made on a continuous 'rolling' basis since ss. 44–47 TA came into force on 19 Feb 2001. See *Gillan* para. 34.

11 [2003] EWHC 2545 (Admin)

12 [2004] EWCA Civ 1067.

13 [2006] 2 AC 307. Not one judge dissented in any of the decisions during the domestic proceedings.

14 *Gillan and Quinton v UK* (App No 4158/05, Judgment of 12 January 2010).

15 See para. 43 of the judgment.

took place *in situ*.¹⁶ The question of what precisely constitutes a deprivation of liberty as opposed to a restriction on the freedom of movement or a restriction of liberty is a complex one, exacerbated by the fact that its determination tends to be very case-sensitive. The ECtHR in *Gillan* took an expansive view of the application of Article 5. Somewhat surprisingly relying on a case from 2008, where the facts were arguably radically different,¹⁷ the ECHR found that the element of compulsion implicit in the stop and search powers was central to the question of whether a deprivation had occurred and entertained the possibility that the s. 44 and 45 TA powers *could* engage Article 5.¹⁸ However, it found that it did not have to settle the question definitively in the light of its findings of a violation of Article 8, the right to privacy.

On the question of whether the applicants' right to privacy had been infringed by the ss. 44/45 powers, the Court resolved the ambiguity which influenced the Lords' determination of the issue by finding that a search of the type envisaged by the TA entailing coercive powers to force an individual to submit to a search was, notwithstanding its brevity, a *prima facie* violation of the right to privacy which required justification.¹⁹ The court was unconvinced by the Lords' analogy with searches at airports and upon entering buildings, highlighting the consensual element of the latter and the fact that, under the TA, '[t]he individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search.'²⁰

As a *prima facie* violation of the right to privacy under Article 8, the Court went on to find that the restrictions on privacy implicit in ss. 44/45 could not be justified as being 'in accordance with the law' as required by Article 8(2). For the Court, the stop and search regime contained inadequate safeguards to prevent against the arbitrary exercise of the powers. There were two aspects of the stop and search scheme, in particular which concerned the Court.

Firstly, it considered the question of the ground of 'expediency in the fight against terrorism' as insufficient justification for the creation of these draconian powers as

16 See in particular, Lord Bingham for the majority, above n 13, paras. 25 and 28.

17 *Foka v Turkey* (App No 28940/95, Judgment of 24 June 2008). The circumstances of this case involved the apprehension and detention in police custody of a Greek Cypriot by the Turkish Cypriot authorities at a border crossing on the island and included allegations of mistreatment and police brutality.

18 *Gillan*, para. 57.

19 *Gillan*, paras. 61 and 63.

20 *Gillan* para. 64.

‘expediency’ was not of the same magnitude as ‘necessity’ and thus a decision to create the powers lack any consideration of the proportionality of the authorisation.²¹ However, the crux of the Court’s finding of a violation of the Convention in this case was the fact that there were inadequate legal safeguards against abuse of the powers by individual officers which was mainly attributable to the absence of a reasonable suspicion requirement.²² Thus, the Court concluded, the provisions therefore violated Article 8(2) ECHR as not being ‘in accordance with the law’.

Analysis

The central issue in this decision was the interpretation of the requirements of the rule of law with respect to the restriction of rights under the convention. The ECHR permits restrictions on several of the rights protected on grounds of public policy provided such measures satisfy the requirements of legality and proportionality, the failure to satisfy the former being the cause of the violation in *Gillan*.²³ The Court has, over the years, developed the conditions of legality under the convention based on the ideal of non-arbitrariness in the exercise of public powers.²⁴ What is clear with respect to the legality requirement under the ECHR from *Gillan* is that it contains both a formal and a substantive aspect. The formal aspect, which was widely considered by the Lords, requires that the rights restricting measure be framed in terms which are sufficiently clear and precise so as to ‘enable the citizen to regulate his conduct ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’,²⁵ a classic formal conception of the rule of law.²⁶ Thus, to ensure certainty in the conduct of public authorities, where domestic law confers discretion on the executive, it must ‘indicate the scope of any such discretion ... and the manner of its exercise with sufficient clarity.’²⁷

However, in *Gillan* the court made clear that the requirement of legality under the Convention also entails a substantive element, relating to the *effective* fettering of public power. In this regard, even precise and clear measures which regulate executive discretion will not satisfy the requirement of legality under the Convention where such discretion is not

21 *Gillan*, para. 80.

22 This is clearly stipulated in s. 45(1)(b) TA.

23 See Articles 2, 5, 6, 7 and 8–11 ECHR.

24 *Malone v UK* (1985) 7 EHRR 14, para 67.

25 *Sunday Times v UK* (1979) 2 EHRR 245, para 49.

26 See B Tamanaha *On the Rule of law: History, Politics, Theory* (Cambridge, 2005), Chapter 7.

27 *Malone*, para. 68.

sufficiently limited in practice.²⁸ With regard to the TA's stop and search powers, it was the absence of a requirement of reasonable suspicion on the part of the police officer that a driver or pedestrian was harbouring prohibited articles which failed the substantive legality requirement.²⁹

The requirement that an officer have a reasonable suspicion that an offence is being committed is an important safeguard in police powers of arrest. As Lord Diplock noted in the English case of *Mohammed-Holgate v Duke*, the reasonable suspicion requirement reflects the compromise between the rival public goods of individual liberty and the effective investigation and prosecution of crime.³⁰ Moreover, its importance in providing a substantive curb on police discretion was highlighted in the leading decision on arrest of *O'Hara v Chief Constable of the RUC*.³¹ In this case, Lord Steyn emphasized the role of the reasonable suspicion requirement in *holding individual officers to account* by requiring a *justification* of the exercise of their powers in any individual case, an important fetter of police discretion which resonates beyond the law of arrest. Thus:

The arrest can only be *justified* if the constable arresting the alleged suspect has reasonable grounds to suspect him to be guilty of an arrestable offence. The arresting officer is *held accountable*. That is the compromise between the values of individual liberty and public order.³²

The requirements of justification and accountability are important substantive safeguards against arbitrariness because they require both that an officer *actually entertained* a suspicion and that such a suspicion can be *objectively justified*, necessarily involving an *ex post* review of the police officer's actions.³³ The former requirement ensures that powers are exercised for the requisite purpose for which they are created and not any other, whereas the latter requirement upholds the accountability of individual officers by ensuring an *ex post* review of their actions on objectively justifiable grounds to ensure that they were not exercised arbitrarily.

28 *Gillan*, para. 87.

29 *Gillan*, para 83.

30 [1984] AC 437.

31 *O'Hara v Chief Constable of the RUC* [1997] ELR 1; [2007] 1 All ER 129. This decision was challenged, unsuccessfully, before the ECtHR, *O'Hara v UK* (2002) 24 EHRR 812.

32 Lord Steyn in *O'Hara* (HL) at 291 (emphasis added).

33 Lord Hope in *O'Hara* (HL) at 298.

Even though these cases concern police powers of arrest, the principle of non-arbitrariness in the exercise of police powers of which they are an expression apply to police powers generally, as removing the requirement that an officer have a suspicion of an offence being committed removes any practical limit on individual discretion. Notwithstanding the fact that the stop and search powers in the TA contain limitations such as that the search must be effected with the exclusive purpose of ascertaining whether an individual is carrying prohibited items,³⁴ and the Code A Guidance in England and Wales, what the Lords failed to appreciate was that in the absence of any accountability mechanism such as the reasonable suspicion requirement, such safeguards are completely ineffective. The effect of the provision is that *every single search* undertaken by an officer in an authorised area, whether actually taken for purposes of s. 45(1)(a) or not, is *ipso facto* lawful given that the decision as to whether a search should be effected and for the correct purpose is completely subjective, the officer both making the decision to search and reviewing it his or her own mind. This, as the ECtHR noted, leaves an unacceptably high level of discretion to individual officers which offends the substantive requirements of the rule of law.

The Lords, in this case, showed an alarming willingness to uphold the legality of the stop and search measures at all costs. Whereas the requirements of legality under the Convention were clearly articulated both in formal and substantive terms by the House, they were not followed through to their logical conclusion. Moreover, the Lords endorsed the sacrifice of human rights at the altar of security by emphasising the difficulties the police face in fighting terrorism, thereby skewing the delicate balance between liberty and security, carefully calibrated over the years through the reasonable suspicion requirement, in favour of enhanced police discretion.³⁵ Moreover, the Lords' confidence in the ability of individual officers to flawlessly exercise their powers presupposes a police force packed with the

34 S. 45(1)(a) TA. These requirements are elaborated in para. 3.8 Code A of PACE. Lord Bingham enumerated eleven safeguards in the stop and search regime which, the Court concluded, were a sufficient curb on the powers, at para. 14.

35 For example, Lord Bingham found that the lack of reasonable suspicion requirements was 'to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for this suspicion', regardless, it seems, of how civil liberties or individual rights are affected by this (para. 35). Perhaps more worryingly, having clearly summarised the serious problems with the lack of any objective criteria to justify the exercise of the powers as argued by Bainsder Singh for the applicants, Lord Brown explicitly acknowledged and endorsed the arbitrary nature of the powers by highlighting the deterrent effect the random deployment of the powers would have on potential terrorists (para. 76).

policing equivalent of Dworkin's mythical Judge Hercules.³⁶ Without wishing to question the competence or the commitment of the security forces, they are only human, and may, at times, act out of boredom, stupidity or even more sinister motives including bigotry and racism,³⁷ which could not be controlled or scrutinised under the TA's stop and search regime.

This judicial deference in terrorism issues is becoming something of a habit since the high water mark of judicial independence in *Belmarsh*,³⁸ which must be reversed if one of the central objectives of the Human Rights Act—the resolution of human rights infringements 'at home' rather than in Strasbourg³⁹—is to be achieved; something which clearly failed in the *Gillan* case. Otherwise, Ewing's thesis of the futility of the Human Rights Act seems an increasingly attractive proposition.⁴⁰

36 Dworkin's device of the 'ideal type' Judge Hercules to illustrate his theory of law as integrity is well known. Hercules is an 'imaginary judge of superhuman intellectual power and patience'. R Dworkin *Law's Empire* (Cambridge, MA: Harvard UP, 1986), 239.

37 The issue of the potential for the abuse of these powers against ethnic minorities, particularly of Asian extraction, was broadly considered by Lord Brown, however, he concluded that the question of discrimination was not relevant to the circumstances in *Gillan* (para. 92).

38 *A and others v Secretary of State for the Home Department* [2005] 2 AC 68. See Ewing and Tham 'The Continuing Futility of the Human Rights Act' (2008) *Public Law* 668–693.

39 *Rights Brought Home: The Human Rights Bill*, October 1997, para 1.14.

40 Ewing 'The Futility of the Human Rights Act' (2004) *Public Law* 829 and Ewing and Tham, above, n. 38.